

THE HIGH COURT

[2018 No. 367 EXT]

BETWEEN

MINISTER FOR JUSTICE & EQUALITY

APPLICANT

AND

ARMANCA MUNTEAN

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 8th day of April, 2020

1. By this application the applicant seeks an order for the surrender of the respondent to Romania pursuant to a European Arrest Warrant dated 10th September, 2018 ("the EAW"). The EAW was issued by Zalău Court of Law, as issuing judicial authority ("IJA").
2. The EAW was endorsed by the High Court on 3rd December, 2018. The respondent was arrested and brought before the Court on 28th November, 2019. The application opened before the Court on 11th February, 2020.
3. At the opening of the application, I was satisfied that the person before the Court is the person in respect of whom the EAW is issued.
4. I was further satisfied that none of the matters referred to in ss. 21A, 22, 23 and 24 of the Act of 2003 arise, and that the surrender of the respondent is not prohibited for any of the reasons set forth in any of those sections.
5. At para. B of the EAW, it is stated that the decision on which it is based is "*Criminal Sentence no. 168/27.06.2018*", of the Zalău Court of Law "*confirmed final as uncontested on 17 July 2018*". It is then stated that the same court then issued Detention Warrant no. 227/2018 on 17th July, 2018. The reference "*Criminal Record No. 1589/337/2018 of the Zalău Court of Law*" is also provided.
6. At para. C information regarding the penalty applicable to the offence to which the EAW relates is provided. The offence is subject to a maximum sentence of imprisonment of five years. The respondent was sentenced to a term of one year's imprisonment, and the full term thereof remains to be served.
7. At para. D of the EAW, it is stated that the respondent was not present in person at the trial after which the sentence was passed. It is then indicated at 3.1a that the respondent was summoned personally for the hearings set for the 27th June, 2018, and that she was informed of the day and place set for the trial, and that she was also informed that a sentence could be passed should she fail to attend the trial. It is further indicated (through the ticking of a box at para. D 3.3 of the EAW) that the respondent did not request a retrial or appeal within the appeal period. However, at para. D 3.4 the box is ticked to indicate that the respondent was not personally handed the judgment but this will be done after her surrender, at which point she will be informed of the right to a retrial or appeal and the time limit for such a retrial or appeal.

8. Additionally, at para. D it is stated that, following the respondent's non-appearance at court, legal proceedings were taken to bring her before the court. It is noted that from information given during investigation the respondent effectively lives in Ireland and had provided an address in this jurisdiction and in Romania, as well as two phone numbers. It is stated that the respondent was unknown by the residents of the Irish address and the phone numbers given were unlisted. Finally, it is outlined that the summoning procedure was completed at the Romanian address and a public defender was appointed for the respondent.
9. At para. E of the EAW, it is stated that the warrant relates to one offence. The particulars of the offence are that on the 3rd February, 2015 the respondent used another individual's identity card and certificate of marriage, thereby assuming the identity of that person, for the purpose of obtaining a temporary passport. The provisions of the Romanian Criminal Code whereby this conduct constitutes an offence are identified. The offence is described as being the offence of false identity contrary to Art. 327 (paragraphs 1 and 2) of the Criminal Code.
10. No box is ticked at para. E.I of the EAW. Accordingly, it is necessary for the actions of the respondent as described in the EAW, leading to her conviction of the offence in Romania, to correspond to an offence in this jurisdiction. At para. E.II under "Detailed description of the acts not covered by section I" the full provisions of Art. 327 of the Romanian Criminal Code are provided.
11. Further information was sought by the central authority in this State prior to the endorsement of the EAW by letter of 26th October, 2018, seeking the period the respondent would have, following surrender, to apply for a retrial.
12. In its reply, the IJA stated that under Art. 425 of the Criminal Procedure Code the convicted person can file an appeal within three days of the "*communication procedure*". This is stated as having been completed as the judgment was sent to the respondent's Romanian address as well as at the "*court's panel*". Under Art. 466 of the Code a person convicted who was tried in their absence can request a reopening of the trial within one month of the day the person was informed that the trial took place. It is then stated that for a person, convicted in *absentia*, "*whose extradition or surrender were requested by a foreign country by means of a European Warrant of Arrest, the term of one month starts on the day when they have been communicated the conviction judgement after they have been brought to the said country.*" It is unclear whether this statement was intended to mean that the respondent would have one month from the date of her surrender to Romania to request an appeal, possibly due to issues in translation.
13. Points of objection were delivered on 10th January, 2020. Five points were raised, as follows:-
 1. The proposed surrender of the respondent is prohibited by s. 37 of the Act of 2003 as it constitutes;

- a. A breach of the respondent's right to fair procedure, trial in due course of the law, and liberty,
 - b. and a disproportionate and impermissible interference with the respondent's right to private and family life
 2. There has been unreasonable and oppressive delay in the issuing and execution of the EAW.
 3. The offence for which the respondent is sought does not correspond to an offence in the State. Neither is it an offence to which Article 2(2) of the Framework Decision applies.
 4. The EAW is unclear regarding whether the offence in question was completed by the issuance of a temporary passport.
 5. The respondent's trial was conducted in her absence and without notification to her. Whilst the EAW states that the respondent was summonsed at the address in Romania, this procedure was not effective. Further, while it is stated that the respondent was granted a public defender, the public defender did not have any instructions from or communications with the respondent.
14. The respondent swore an affidavit dated 10th January, 2020, in support of her opposition to this application. In this affidavit, the respondent states that she came to this State in 2005, at the age of 13, to live with her mother. The respondent exhibits a letter from An Garda Síochána, dated 22nd August, 2008, certifying that the respondent had been living in Ireland for approximately three years at that time. The respondent avers that she has been living at her current address for the past one and a half years and has been in receipt of social welfare payments for a number of years.
15. The respondent avers that she is the mother of six children who are living in this State. She avers that the two youngest of those children are living with her alongside her current partner and his family. She further avers that due to child protection concerns the respondent and her partner are the subject of a Safety Plan which prevents her partner from being unsupervised with the children. This Safety Plan is included as an exhibit to the affidavit.
16. In her affidavit the respondent disputes the statement in the EAW that she was notified of the trial in Romania and avers that she had no contact with a lawyer in connection with that trial. It is averred that on or about the time of the offence for which surrender is sought, 3rd February, 2015, the respondent was arrested and interviewed by the Romanian police and admitted that the documents presented were not her own. She avers that the police informed her that she would have to attend court but that the likely outcome would be a fine and she was then released without being informed of a court date.
17. The respondent states that she recalls providing addresses and telephone numbers to police in Romania., but avers that the Romanian address on the EAW is her

grandmother's address and does not recall giving this address but accepts that she may have done so. The respondent avers that she did not receive any communication in relation to the criminal process and has had a new telephone number since approximately 2017.

18. In relation to the alleged offence it is stated that the respondent travelled to Romania, using a letter from the Romanian embassy in Ireland, at the end of 2014 in order to obtain a national identity card and passport. The respondent avers that when she attempted to obtain these documents she was informed that as she was born in Germany she should have sought identity documents in Germany. It is then averred that a friend of the respondent's former partner suggested that the respondent use documents belonging to the friend's wife to obtain a travel document in order to return to Ireland. The respondent avers that she attempted to use these documents, giving rise to the subject matter of the EAW. It is then stated that the respondent later returned to the Romanian authorities and successfully obtained a passport on 14th May, 2015 and a national identity card on 8th May, 2015.

Submissions of the parties

19. This application may be decided on the basis of one of the objections alone, and, accordingly, I will address that objection only. That is the objection that the actions of the respondent as described in the EAW do not correspond to an offence in the State.
20. Firstly, the applicant submits that the use of somebody else's identity document for the purposes of being issued a temporary passport constitutes an offence in this jurisdiction. Counsel for the State relied on the Criminal Justice (Theft and Fraud Offences) Act 2001 ("the Act of 2001") to establish correspondence. The first offence which it is submitted corresponds to the offence for which surrender is being sought is that of "*using a false instrument*" under s. 26 of the Act of 2001. This section sets out:-

"A person who uses an instrument which is, and which he or she knows or believes to be, a false instrument, with the intention of inducing another person to accept it as genuine and, by reason of so accepting it, to do some act, or to make some omission, or to provide some service, to the prejudice of that person or any other person is guilty of an offence."

Counsel for the State accepted that the document that was used by the respondent in committing the offence described in the EAW was a genuine document belonging to another person. However, it is submitted that s. 26 of the Act of 2001 is routinely relied upon when prosecuting such use of a genuine document.

21. A false instrument is defined under s. 30 of the Act of 2001:-

"30.—(1) An instrument is false for the purposes of this Part if it purports—

- (a) to have been made in the form in which it is made by a person who did not in fact make it in that form,*

- (b) *to have been made in the form in which it is made on the authority of a person who did not in fact authorise its making in that form,*
- (c) *to have been made in the terms in which it is made by a person who did not in fact make it in those terms,*
- (d) *to have been made in the terms in which it is made on the authority of a person who did not in fact authorise its making in those terms,*
- (e) *to have been altered in any respect by a person who did not in fact alter it in that respect,*
- (f) *to have been altered in any respect on the authority of a person who did not in fact authorise the alteration in that respect,*
- (g) *to have been made or altered on a date on which, or at a place at which, or otherwise in circumstances in which, it was not in fact made or altered, or*
- (h) *to have been made or altered by an existing person where that person did not in fact exist.*

(2) *A person shall be treated for the purposes of this Part as making a false instrument if he or she alters an instrument so as to make it false in any respect (whether or not it is false in some other respect apart from that alteration)."*

22. It is submitted that, even if a document is genuine when used by the appropriate owner, the use of the document to identify another person renders it a false document in that circumstance.
23. As against all of this, it is submitted on behalf of the respondent that the offence created by s. 26 of the Act of 2001 is concerned with the characteristics of the instrument, i.e. a false instrument (as defined in the Act of 2001), and not the use of a valid instrument by a person other than to whom the instrument issued. The latter is what occurred in this case. This is more akin to an offence of impersonation.
24. This is apparent from the provisions of Romanian law pursuant to which the respondent was convicted. Article 327(1) of the Romanian Criminal Code provides:-

"The act of presenting oneself under a false identity... to mislead or maintain the deceit of a public servant, in order to produce legal consequences for oneself or for another, shall be punishable by no less than 6 months and no more than 3 years of imprisonment."

Article 327(2) of the Romanian Criminal Code provides:-

"Where the document was produced by using the real identity of an individual, the penalty shall consist of no less than 1 and no more than 5 years of imprisonment."

25. It is submitted that the actions of the respondent, as described in the EAW do not constitute an offence under s. 26 of the Act of 2001. In reply to this argument, counsel for the applicant (in addition to the argument referred to above) submitted that the actions of the respondent might also constitute an offence under ss. 6 or 7 of the Act of 2001. These sections provide as follows:-

"6.—(1) A person who dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another, by any deception induces another to do or refrain from doing an act is guilty of an offence.

(2) ...

7.—(1) A person who dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another, by any deception obtains services from another is guilty of an offence."

26. In response to this argument, it is submitted on behalf of the respondent that there is no evidence of any inducement for the purposes of s. 6 of the Act of 2001. Moreover, it is apparent from the definition of "gain" and "loss", as set forth in s. 2 of the Act of 2001, that these words are specifically defined as follows:-

"(a) "gain" and "loss" are to be construed as extending only to gain or loss in money or other property, whether any such gain or loss is temporary or permanent."

None of these factors are present in this case.

Decision on issue of correspondence

27. Firstly, there is, in my view, no doubt at all that the actions of the respondent would not constitute an offence under either s. 6 or s. 7 of the Act of 2001. These sections are clearly linked to "gain" and "loss" as defined in the Act of 2001 and involve the loss or gain of money or other property. It is very clear that the actions of the respondent, as described in the EAW, do not involve such gain or loss.

28. As regards s. 26 of the Act of 2001, I think that it is equally clear that the actions of the respondent would not constitute an offence under that section of the Act either. This section relates to the use of an instrument that is a false instrument. An instrument does not become a false instrument because it is being used by a person other than the person to whom it has been issued for illicit purposes. The instrument remains a valid instrument and may still be used by the person to whom it was issued. In any case, "false instrument" is defined in s. 30 of the Act of 2001, the provisions of which are set out above. It was not explained to this Court how a validly created and issued passport could fall within any of the descriptions of instruments referred to in this definition, and it does not appear to me that this is the case. Accordingly, surprising as it may seem, the actions of the respondent, as described in the EAW, do not appear to constitute an offence in this jurisdiction, or at least they do not constitute any of the offences contended for on behalf of the applicant in the course of this application. Accordingly, it follows that the respondent should not be surrendered, and the application must be refused. Having

regard to the decision reached on this objection, it is not necessary to give consideration to the other objections raised on behalf of the respondent.